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In The

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Supreme Court of the United States

October Term, 1970

No. 475

MAX LIBEN, JACK LIBEN, NORMAN LIBEN, SELMA LEVINE, all doing business under the firm name and style of M. LIBEN TIRE CO.,

Petitioners,

- against -

THE CITY OF NEW YORK, LINCOLN AMSTERDAM URBAN RENEWAL AGENCY, and THE SUPREME COURT OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No.

MAX LIBEN, JACK LIBEN, NORMAN LIBEN, SELMA LEVINE, all doing business under the firm name and style of M. LIBEN TIRE CO.,

Petitioners,

vs.

THE CITY OF NEW YORK, LINCOLN AMSTERDAM URBAN RENEWAL AGENCY, and THE SUPREME COURT OF THE STATE OF NEW YORK,

Respondents.

Petition for Writ of Certiorari

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, MAX LIBEN, JACK LIBEN, NORMAN LIBEN, and SELMA LEVINE, hereby petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit affirming the dismissal of the petitioners' action to remove a condemnation

proceeding of the Lincoln Amsterdam Urban Renewal Agency of the City of New York and the Supreme Court of the State of New York to the United States Court for the Southern District of New York pursuant to Title 28 U.S.C. 1441 thereof, Article 6, Clause 2 of the Constitution of the United States, Com. of Mass. v. Bartlett, D.C. Mass. 1967, 266 F.Supp. 390, and Oyama v. California, 332 U.S. 633, which application was denied by Judge Dudley B. Bonsal, United States District Judge in the Southern District of New York by judgment entered January 23, 1970.

The application also included a motion for a temporary restraining order and preliminary injunction to convene a three-judge court on the grounds of the unconstitutionality of the Condemnation Law of the State of New York pursuant to Title 28 U.S.C. 2283.

Opinions Below

There were no opinions in the decisions of the court below. An order signed by Judge Dudley B. Bonsal and entered on January 23, 1970 dismissed the complaint herein and granted summary judgment to the respondents.

The United States Court of Appeals for the Second Circuit affirmed the lower court decision without opinion by judgment entered on the 7th day of May, 1970. A copy of the Order of the United States District Court for the Southern District is annexed hereto as Appendix "A". Appendix "B" is a copy of the Order of the United States Court of Appeals for the Second Circuit.

Jurisdiction

The order sought to be reviewed herein was made on the 7th day of May, 1970. An order denying an application for a three-judge court for the removal of a condemnation proceeding of the City of New York against the petitioners entered on January 23, 1970 was made. It is believed that the statutory provision which confers jurisdiction on this Court to review the order in question is 28 U.S.C. 1254(1).

Questions Presented

1. Can the City of New York exercise the function of eminent domain in violation of the Declaration of Human Rights to which the United States is pledged by treaty to uphold?

2. Can the City of New York, by applying a law contrary to the Treaty Law of the United States in the Supreme Court of the State of New York, contravene the public policy of the United States?

The Facts

This matter was before the District Court on a motion for a temporary restraining order and preliminary injunction to convene a three-judge court on the grounds of the unconstitutionality of the Condemnation Law of the State of New York.

The petitioners are a partnership which owns real estate, which is the subject of a condemnation proceeding by the respondent, City of New York, and is the object of an Order of Possession

based upon a Writ of Assistance to evict the petitioners on or before the 31st day of January, 1970.

The petitioners are owners of a tire sale and distribution business under a franchise from the Dunlop Tire and Rubber Company. The petitioners stand to lose their franchise if they are required to move from their present location to a location outside of the County of New York. Such loss would cause them irreparable damage. That due to zoning requirements and other rules and regulations of the City of New York, it is virtually impossible for the petitioners to acquire a similar location in the County of New York under the terms of the condemnation.

The petitioners demanded, among other things, that a three judge court be convened on the issue of the unconstitutionality of Article 1, section 7 of the Constitution of the State of New York, and section 4 of the Condemnation Law of the State of New York. They also requested that a condemnation proceeding vesting title of the parcel in the respondent City of New York under Index No. 408811/1967, Supreme Court of the State of New York, County of New York, be reopened upon its merits and be removed to and be litigated in this Court pursuant to Title 28 U.S.C. 1441, in that the petitioners have a constitutional right to rely upon treaties of the United States of America as the supreme law of the land, and to litigate matters arising out of treaties in district courts of the United States of America.

The Constitutional Provisions Involved

Article 6, Clause 2 — Constitution of the United States.

> "All treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Fourteenth Amendment — Constitution of the United States.

> "Or shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 7 — Constitution of the State of New York.

> "(a) Private property shall not be taken for public use without just compensation."

Argument

Point I

THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE MEANING OF TITLE 28 U.S.C. 1441, THE TREATY CLAUSE OF THE CONSTITUTION OF THE UNITED STATES, THE UNITED NATIONS CHARTER, AND THE DECLARATION OF HUMAN RIGHTS.

The condemnation of the petitioners' real estate was done subsequent to a public hearing in which a Roman Catholic Priest and a Jewish Rabbi invoked the needs of their respective congregations.

The Board of Estimate completely disregarded the rights of the petitioners who occupy the premises consisting of 46,000 square feet of space and have been in operation since 1911 employing twenty-five persons in the operation of their business.

The respondent has likewise acted in bad faith in that contracts for the alleged public purpose of low income housing and middle income housing have not been made. There is a notorious lack of available funds to implement any alleged plans for the alleged public purpose, and there are many precedents whereby the respondent has condemned property and then resold the condemned property for private purposes.

The California Alien Land Laws were struck down as being in violation of the Constitution of the United States.

It is submitted that the condemnation herein is in violation of petitioners' civil and constitutional rights as well as their rights under the Declaration of Human Rights and the United Nations Charter.

See Article 17 of the Declaration of Human Rights:

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

See Oyama v. California, 332 U.S. 633:

"Moreover, this nation has recently pledged itself through the United Nations Charter to promote respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, and religion. The alien Land Law stands as a barrier to the fulfillment of that national pledge. It is inconsistent with the Charter, which has been duly ratified and adopted by the United States and is but one more reason why the statute must be condemned. . . ."

". . . And So, in origin, purpose, administration and effect the alien land Law does violence to the high ideals of the Constitution of the United States and the Charter of the United Nation. It is an unhappy facsimile, a disheartening reminder of the

racial policy pursued by those forces of evil whose destruction recently necessitated a devastating war. It is racism in one of its most malignant forms. Fortunately, the majority of the inhabitants of the United States and the majority of those in California reject the racism and all of its implications. They recognize that under our Constitution all persons are entitled to the equal protection of the laws without regard to their racial ancestry. Human liberty is in too great peril today to warrant ignoring that principle in this case. For that reason, I believe that the penalty of unconstitutionality should be imposed on the alien Land Law."

See also Com. of Mass. v. Bartlett, D.C. Mass. 1967, 266 F.Supp. 390:

"Although the Constitution contains no express provision limiting exercise by the state of its power of eminent domain, like other powers of the state such power is subject to this clause, and the state's exercise of its power must yield when it conflicts with a paramount federal statute."

Point II

PETITIONERS ARE ENTITLED TO A TRIAL BY A THREE-JUDGE FEDERAL COURT.

The constitutionality of Article 1, section 7 of the Constitution of the State of New York is believed to be unconstitutional and, pursuant to Title 28 U.S.C. 2283, there is a statutory re-

quirement of a three-judge federal court as well as federal jurisdiction under Title 28 U.S.C. 1441.

See The Record of the Association of the Bar of the City of New York, Volume 24, No. 8, Page 487, Condemnation Proceedings — A Proposal By The Honorable Aron Steuer Justice, Supreme Court, Appellate Division:

> ". . . Some questions in regard to eminent domain do lend themselves to court decision. Such questions as whether a public purpose is being served, who the person is that is entitled to compensation or whether the property is legally exempt from condemnation are plainly within the proper competence of the courts. But it is equally clear that the issue most often litigated, the amount to be paid, technically called the quantum issue, is not. . . ."

See also Adirondack Railway v. New York State, 176 U.S. 335:

> ". . . It is insisted, however, that the constitutional limitations on the exercise of the power, though conditions merely and not part of the power itself, require that the owner shall have an opportunity to contest the legality of the taking, and that ultimate payment of just compensation must be secured. . . ."

Conclusion

FOR THE FOREGOING REASONS, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED AND UPON GRANTING CERTIORARI THE COURT SHOULD REVERSE THE DETERMINATION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Respectfully submited,

GENE CRESCENZI
Attorney for Petitioners

Appendix A

Order Granting Motion for Summary Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MAX LIBEN, JACK LIBEN, NORMAN LIBEN, SELMA LEVINE, all doing business under the firm name and style of M. LIBEN TIRE CO.,

Plaintiffs,

-against-

THE CITY OF NEW YORK, LINCOLN AMSTERDAM URBAN RENEWAL AGENCY and THE STATE OF NEW YORK,

Defendants.

---

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A motion having been regularly made by the defendants herein for summary judgment in the defendant's favor dismissing the action on the ground that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law.

Now, on considering the memoranda submitted by the respective parties; and after hearing counsel for the respective parties, and due deliberation

having been had, and the decision of the court having been filed, it is

ORDERED, that said motion be and the same hereby is granted, and that judgment be entered herein in favor of all of the defendants dismissing this action in favor of the defendants and against the plaintiffs.

Dated: New York, N.Y.
January 22, 1970

s/ Dudley B. Bonsal
United States District Judge

JUDGMENT ENTERED — 1/23/70

s/ John Livingston
CLERK

Appendix B

Judgment Appealed From

UNITED STATES COURT OF APPEALS

For The

SECOND CIRCUIT

--*--

34608

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of May, one thousand nine hundred and seventy.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. STERRY R. WATERMAN,
Circuit Judge,

HON. WILLIAM J. JAMESON,
District Judge.

Judgment Appealed From

Max Liben, Jack Liben, Norman Liben, Selma Levine, all doing business under the firm name and style of M. LIBEN TIRE CO.,

Plaintiffs-Appellants,

v.

The City of New York, Lincoln Amsterdam Urban Renewal Agency, The Supreme Court of the State of New York,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk

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against

THE CITY OF NEW YORK, LINCOLN-AMSTERDAM URBAN RENEWAL AGENCY, and THE SUPREME COURT OF THE STATE OF NEW YORK,

Respondents.

BRIEF OF THE CITY OF NEW YORK IN OPPOSITION TO PETITION FOR CERTIORARI

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against

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Respondents.

BRIEF OF THE CITY OF NEW YORK IN OPPOSITION TO PETITION FOR CERTIORARI

Statement

Petitioners seek certiorari to review an order of the United States Court of Appeals for the Second Circuit, entered May 7, 1970, which affirmed a judgment of the District Court, Southern District of New York. The judgment of the District Court dismissed this action, which collaterally challenges the appropriation of petitioners' real property in an eminent domain proceeding brought in the Supreme Court of the State of New York.